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No. _____

In The

Supreme Court of the United States

October Term, 1989

BRUCE E. ARGO,

Petitioner,

vs.

ROBERT H. BUTLER, SR., WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Is it a violation of the Equal Protection Clause to allow a justification of self-defense under La. R.S. 14:20 (Article 20) to a defendant charged with attempted murder when his victim has died but to deny this defense to one charged with the same crime whose victim has lived?

(a) May persons charged with the same crime under the same circumstances (except death of the victim) have different standards of self-defense?

(b) Is a defendant charged with the lesser and included offense of attempted first degree murder entitled to the same self-defense instruction as one charged with the completed offense?

2. Did the state trial court's refusal to allow the jury to consider self-defense under Article 20 unless the victim has died violate the Due Process Clause?

(a) Is it a denial of due process for the right of self-defense to depend upon circumstances occurring after the alleged criminal act?

(b) Did the state trial court relieve the state of one of its elements of proof in violation of the Due Process Clause in denying the defendant the requested self-defense charge?

(c) Was due process violated in the court's failure to interpret this criminal statute strictly in favor of the defendant?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Bruce E. Argo, and the respondent, Robert H. Butler, Sr., Warden, Louisiana State Penitentiary.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Bruce E. Argo respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on May 23, 1989.

OPINIONS BELOW

The Order of the Court of Appeals for the Fifth Circuit has not been reported. It is reprinted in the appendix hereto, App. 1, *infra*.

The Judgment of the United States District Court for the Western District of Louisiana has not been reported. It is reprinted in the appendix hereto, App. 8, *infra*. The Supplemental Report and Recommendation of Magistrate has not been reported. It is reprinted in the appendix hereto, App. 9, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 United States Code § 2254, the petitioner brought this Petition for Writ of Habeas Corpus in the Western District of Louisiana. On February 7, 1988, the Western District denied this petition. See App. 8, *infra*.

An appeal was taken to the United States Court of Appeal for the Fifth Circuit, which court denied the application for a certificate of probable cause on May 23, 1989. See App. 1, *infra*. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Louisiana Revised Statutes 14:20.

A homicide is justifiable when committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger.

STATEMENT OF THE CASE

Petitioner Bruce E. Argo was tried and convicted in state court for the crime of attempted first degree murder. Although self-defense was an obvious issue and was to have been one of the defendant's primary defenses at trial, the trial court refused to apply Article 20 of the Louisiana Criminal Code as requested, denying the defendant the right to argue self-defense under that article and refusing to instruct the jury on self-defense under Article 20. The court based its ruling on the fact that the victim had not died. Petitioner was thereafter convicted of attempted first degree murder in the First Judicial District Court, Caddo Parish, Louisiana, on October 26, 1984, and was sentenced to a term of forty (40) years at hard labor.

The specific facts before the court were the following: On October 30, 1983, Bruce Argo, who was then 18 years of age, had been on a hunting trip with two friends, Jimmy Edwards and John Durr. Shortly prior to 2:00 that morning, Edwards was driving a truck through various areas in southwest Shreveport, and Durr was in the front seat with him. Bruce Argo was lying in the bed of the truck under some blankets, possibly sleeping, according to the evidence.

Edwards drove to the Hillside Apartments and parked in the parking lot. Bruce remained wrapped in the blankets in the back of the truck. While Durr was walking around in the parking lot, a police car drove into that area. The officer stopped and came over to the truck. He had Durr stand by the truck with his hands on the hood. He then told Edwards to get out. Edwards unexpectedly

began firing at the officer as he slid across the seat of the truck.

The officer, D. L. Slauson, began firing his .357 Magnum in the direction of the truck and took cover behind a car across the parking lot. Officer Slauson fired five times, hitting the truck that Bruce Argo was in with one shot, hitting an adjacent vehicle with another, and firing in Bruce's direction with the other shots. Thus, five shots had been fired at and around Bruce before he became involved in this incident.

Bruce raised up and shot once in the direction from which the five shots had been fired. This shotgun blast struck Officer D. L. Slauson.

A primary defense had been that Bruce Argo's reaction after five shots had been fired toward him by the officer was justifiable under Louisiana Revised Statutes 14:20. The evidence had shown that he reasonably believed himself to be in imminent danger of losing his life or receiving great bodily harm and that his firing the shotgun was necessary to save himself from that danger. He had not started the shooting and only fired after the officer had fired five shots in his direction.

The court, however, refused the defense request to charge the jury under R.S. 14:20 but instead instructed the jurors on the law only under R.S. 14:19, which permits the use of force or violence to prevent a "forcible offense," which would preclude the instant situation wherein the officer was not committing an "offense." This issue was raised and argued during voir dire of the jury. A timely objection was made to the court's ruling.

The jury found Bruce Argo guilty as charged, and the court sentenced him to forty (40) years at hard labor.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW THAT DENIES A RIGHT OF SELF-DEFENSE TO A DEFENDANT CHARGED WITH ATTEMPTED MURDER OF A SURVIVING VICTIM BUT GRANTS SUCH A DEFENSE TO ONE CHARGED WITH EXACTLY THE SAME CRIME BUT WHOSE VICTIM HAS DIED RAISES IMPORTANT AND UNRESOLVED EQUAL PROTECTION ISSUES.

A. The Facts Presented A Classic Self-Defense Issue.

The evidence is undisputed that Bruce Argo was not involved in the instigation of this incident but fired a shotgun one time in a reaction to five shots that had been fired in his direction.

The evidence showed that this was a situation involving an 18-year old boy, frightened to death, responding to bullets hitting all around him. A key issue was the factual question of whether he fired the single shot in self-defense or not. This was an issue for the jury to decide. There was sufficient evidence to conclude that Bruce reasonably believed himself to be in imminent danger of losing his life or receiving great bodily harm and that his firing the shotgun was necessary to save himself from that danger. This was arguably a justifiable reaction under Article 20 after the five shots had been fired at him.

At least the defendant was entitled to have the jury decide this question.

This was a classic self-defense case in the sense that the issue was clearly defined. There was no question here that five shots had been fired toward Bruce Argo before he raised up and shot. This 18-year old boy was responding to bullets hitting all around him. The question was whether this met the test of self-defense or not.

Yet the trial court refused to instruct the jury under Article 20, which would have allowed them to consider whether he acted in self-defense or not. (The court did give an instruction under Article 19, which is meaningless since it clearly did not apply to the facts of this case.) The reasoning of the district court was that Article 20 is limited to situations where a homicide actually results, regardless of the fact that the defendant is charged with an attempted homicide. The effect of this ruling is simply that in a nonoffender situation, there is a right of self-defense if the victim dies. There is no right of self-defense if he lives. We submit that this conclusion is constitutionally improper.

B. Persons Charged With The Same Crime Under The Same Circumstances May Not Have Different Standards Of Self-Defense Depending Upon The Ultimate Death Or Life Of The Victim.

The state trial court in this case explicitly established two categories of defendants accused of attempted murder in its interpretation of the Louisiana statute regarding

the justification of self-defense, La. R.S. 14:20. This statute reads as follows:

> "A homicide is justifiable:
>
> (1) when committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger; or
>
> . . . ."

Petitioner, Bruce Argo, 18 years of age, was tried on the charge of attempted first degree murder. Self-defense was a legitimate and important part of the defendant's case. In fact, it was to have been the chief defense set forth by Bruce Argo. Thus it was devastating to the defense when the court refused to charge the jury under the appropriate self-defense statute, thus effectively eliminating this defense and relieving the state of one of the elements of its proof.

The basis for an Equal Protection objection is that the trial court interpreted Article 20 of the Louisiana Criminal Code as dividing defendants charged with this crime into the following categories:

Attempted Murder Defendant Whose Victim Died	*Attempted Murder Defendant Whose Victim Lived (Bruce Argo)*
Self-defense available under Article 20	No self-defense under Article 20

It was acknowledged that if the victim in this case had died, the court would have instructed the jury on self-defense under Article 20. However, since the victim lived, the court ruled that this article would not apply and

refused to instruct the jury accordingly. This error was extremely crucial because while this was an attempted homicide case, the trial court refused to afford the defendant the benefit of the homicide self-defense statute.

(The court did include in its charge La. R.S. 14:19, which the state had requested. This is an article that provides for self-defense in response to a "forcible offense" against the person or property. It had no applicability to this case at all since the victim was a police officer on duty and in no sense a "forcible offender." Since that article had no applicability whatsoever, an instruction to the jury pursuant to it was equivalent to no instruction on self-defense at all.) The court's refusal to apply Article 20 to this case effectively denied Bruce Argo a most crucial part of his defense.

In the following sections, we shall demonstrate how this denial is a violation of the Equal Protection of the Laws Clause of the Fourteenth Amendment.

C. The Threshold Question Involves The Degree of Scrutiny To Be Applied.

1. Strict Scrutiny Should Apply to the Present Classification.

In cases alleging a violation of the Equal Protection Clause of the Fourteenth Amendment, a three-tier approach to the degree of scrutiny to be applied has been developed. There have evolved three degrees of scrutiny for courts to apply in analyzing challenged statutes: "strict scrutiny," "intermediate" or "heightened scrutiny" and "rational review." See *Plyer v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2394-96, 72 L.Ed.2d 786 (1982); *City of Cleburne*,

Texas v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); and *Cleburne Living Center v. City of Cleburne, Texas*, 726 F.2d 191 (5th Cir. 1984).

While we believe that the classification set forth in this state law is unconstitutional under any of the three levels of scrutiny, we believe that such a "fundamental right" is at issue that a strict scrutiny standard is appropriate.

We believe that it is appropriate to consider this right as the right to fairness in the criminal process. The state court in *Bazley v. Tortorich*, 397 So.2d 475 (La. 1981), included the "[r]ight to fairness in the criminal process" as one of the recognized fundamental constitutional rights, citing *Mayer v. Chicago*, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971), and *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

The right of an accused to fairness in the criminal proceedings brought against him surely must rank as one of the most vital and important rights that we as citizens possess. The Supreme Court in *Coppedge v. United States*, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962), stated:

> *"When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps.* No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. *The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged."*
>
> (369 U.S. at 449) (Emphasis added)

The statute before the Court would then be subject to strict scrutiny and be declared invalid unless it can be shown that a compelling governmental interest exists. We submit that this is the proper standard to apply and further submit that no compelling governmental interest can possibly be established for dividing defendants accused of attempted murder into two classifications according to the fate of their victims.

2. Even If a Rational Review Standard Were Applied, This Classification is Invalid.

Even if the present classification is not considered to be such a fundamental right as to be judged by the standard of strict scrutiny, it still must satisfy the inquiry of whether the differential treatment has a rational basis which is reasonably related to a legitimate governmental interest. *Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-175, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980).

We can conceive of no state interest at all that is promoted by the arbitrary classification of criminal defendants employed in this case. There can be no logical rationale for a distinction between defendants based upon whether the victim died or not (particularly since the more favorable treatment applies to cases where the victim did die). In fact, such a division actually works to the detriment of sound public policy. Thus, this statute as written or interpreted must be found constitutionally defective even if a rational review standard is applied.

D. The State Court's Interpretation Fails Either To Serve A Compelling Governmental Interest Or To Serve Any Legitimate Public Purpose.

The state court's distinction between defendants whose victims died and those whose victims lived serves no public purpose whatsoever. This is a totally arbitrary and unworkable distinction, actually doing substantial harm to the state's criminal justice system in this area of the law. We wish to present a few examples of how this manner of interpreting this self-defense statute works to the detriment of enforcing the state's criminal laws – and, therefore, to the detriment of the public good.

1. Hypothesis Number One: Two Defendants Charged With Identical Acts, Yet Only One Victim Died.

Assume that two attempted murder trials are in progress in some courthouse, both involving the shooting of police officers. In both instances the crimes charged are identical, the acts committed by the respective defendants are identical and all facts are identical – except that in one case the police officer died and in the other he survived. (Needless to say, even in the former case the district attorney for any of many reasons may choose to charge the defendant with attempted first degree murder even though the victim died. La. R.S. 14:27) Under the district court's ruling in the present case, the first defendant, where the officer died, has the benefit of self-defense under Article 20. Yet, incredibly, across the hall in the other courtroom, the defendant on trial for exactly the same crime would be denied this defense.

These two cases involve exactly the same crime and the same intent. Everything is equal except a factor over which neither defendant has any control and which occurs after commission of the crime. The ultimate death of one victim changes the complexion of the case entirely for that accused. Suddenly he is afforded an entire defense that is denied the defendant whose victim lived.

It is incomprehensible that two defendants charged with the same crime under the same circumstances would have different laws apply regarding justification for their acts. Under the ruling in the present case, the two criminal cases in this hypothesis would become vastly different once one victim died.

It is even more incredible that the defendant with the stronger case is the one whose caused a death! The court's reasoning in effect places a premium upon the completion of a homicide in these circumstances and imposes a penalty for failure to kill a victim. Surely such an implicit encouragement of death runs counter to every principle of public policy in this area of the law. Indeed, one who shoots at an officer and misses might have reason under this ruling to fire again in hopes of greater success if self-defense is to be any justification for his act. This interpretation flies in the face of the public policy that should be operating to protect a police officer rather than to encourage his death. It also runs counter to the public policy of fair and equal treatment of criminal defendants similarly situated.

2. Hypothesis Number Two: What If Officer Slauson Later Dies From this Wound?

We next ask the Court to consider the illogic of the trial court's reasoning if the victim police officer does not

die immediately. This, of course, is a realistic possibility. The victim might go into a coma for a substantial period of time. Under the approach in the instant case, there would be no self-defense available to the defendant during the days, weeks or months that the officer continued to live, but once he eventually died, the defense would be immediately available.

Suppose the perpetrator is charged and tried while the victim lives. There is no self-defense under the reasoning of this case since no homicide has occurred. If the officer dies from the wound after the defendant has been convicted, there is suddenly a defense available to him, and presumably he is entitled to a new trial.

This set of circumstances can be most directly examined in light of the present case. Bruce Argo has been tried and denied an Article 20 self-defense because Officer Slauson was wounded but not killed. What if Officer Slauson now develops a problem from his wounds and dies? Bruce would instantly have a defense that was not afforded him at trial. It seems to make no sense that Bruce Argo's case may be subject to retrial because of the death of a victim long after the original trial and conviction. In fact, Bruce's conviction is in a state of limbo for the rest of Officer Slauson's life. If at any time Dennis Slauson dies as a result of this wound, Bruce Argo immediately acquires a defense which he did not have at trial.

Additionally, what if Officer Slauson's death many years down the road is speeded up because of this wound? It is not unreasonable to assume that his life expectancy may have been shortened because of this injury. Thus, if he dies prematurely because of this

wound, might we not be entitled to argue that Bruce Argo's shot did indeed cause the victim's death, thus qualifying as a "homicide" under Article 20? If we are to give a strict construction to criminal statutes so that they favor the defendant, as we are required to do, we are almost compelled to acknowledge that a premature death because of a gunshot wound is to come within the scope of the term "homicide" for purposes of the self-defense statute.

Therefore, for years to come, Bruce Argo's conviction will depend upon the state of Dennis Slauson's health. This does not appear to be a wise interpretation from the point of view of the state, the defendant or the public. Surely the district court's interpretation of Article 20 must give way to sounder principles of public policy. However, as this case presently stands, we believe it is undisputed that if Officer Slauson subsequently dies, this defendant, Bruce Argo, must be given the right to assert his new self-defense justification under La. R.S. 14:20.

Here again, the public good is not served by this arbitrary distinction; it suffers.

3. Hypothesis Number Three: Suppose a Person Shoots Two People In An Incident and Only One Dies?

We have previously discussed the anomaly of two defendants committing the same act with the same intent yet being treated differently. Another untenable situation would involve a single accused shooting two people in the same incident with only one death occurring.

For example, suppose Officer Slauson had had a partner, and Bruce had fired two shots, injuring Slauson and killing the other officer. For various reasons the district attorney might choose to charge him with two counts of attempted murder. As to one count, Bruce would be entitled to assert self-defense. Yet with reference to the other count, he would be denied such a defense. This is true even though both occurred at the same time, arose out of exactly the same incident and involved exactly the same intent.

If the two charges are tried together, the jury somehow would have to be instructed to consider self-defense as to the shot resulting in death and to eliminate any consideration of self-defense as to the other shot which only wounded the officer.

This is an untenable situation. Beyond this, it is a totally unnecessary dilemma. It arises only out of a strained interpretation of Article 20. The only reasonable solution, we submit, is to recognize that attempted murder is a lesser degree of the completed offense of murder and to afford a defendant charged with attempted murder the same defense to which he would be entitled if he had been charged with murder. It makes no sense to attempt to distinguish between victims who have died and those who have not in determining whether a defense exists or not. It certainly serves no public purpose.

4. Hypothesis Number Four: How Would a Court Handle a Causation of Death Question?

Another obvious question that comes to mind involves a cause of death issue. What if a victim (still a

non-offender victim, such as a police officer) dies, and it is unclear whether the defendant's act was actually the cause of death or not? This could involve a myriad of possibilities. Perhaps the victim had a preexisting illness that might have taken his life anyway. Perhaps more than one person shot the victim, and it cannot be determined to a certainty which shot killed him. Bringing to mind the cases of concurrent causes in tort law, it might well be that more than one cause brought about the individual's death.

How do we handle these situations? The question becomes critical under the trial court's interpretation of Article 20 as to whether self-defense can be urged or not.

Is a pretrial hearing required to determine cause of death so that the court can rule on the question of whether or not self-defense may be argued? Or is the cause of death issue to be submitted to the jury for a determination whether a defendant can even claim self-defense or not? There are some potential pitfalls with the former solution in that a defendant might be denied his right to trial by jury on this factual issue. However, it seems equally unreasonable to present to a jury at a criminal trial the responsibility of determining whether there is a right of self-defense which they themselves are then required to apply to the case. This would appear to be an unfair burden on the jurors as well as an unreasonable approach for the defendant, who would not even be in a position of knowing whether he had the right to argue self-defense or not until the jury decided his case. Under such circumstances, how would a defendant even be able to prepare for trial or present his case?

Again, we suggest that this interpretation creates untenable and unnecessary problems. There is absolutely no state interest served by this classification. This is an irrational classification that arose solely out of a quirk in the wording of this state statute. This statute talks of justification for a "homicide," so the trial court applied a literal reading to the statute, reasoned that a homicide had not resulted here (ignoring the fact that the defendant was charged with an attempted homicide), and refused to instruct the jury under this statute. If a homicide had resulted, even though the defendant might be on trial for attempted homicide, the court clearly would have given the requested instruction.

In a nation that prides itself on equal justice under the law, this is clearly a violation of this defendant's right of equal protection in the extreme. The state treated him far more onerously than others similarly situated without any rational basis for doing so. No state interest was served. It is this type of arbitrary treatment that the Fourteenth Amendment equal protection guarantee was designed to prevent.

Such an arbitrary denial of a right of self-defense to those whose victims did not die while allowing it to defendants whose victims died cannot be countenanced under our Constitution. As stated by the Supreme Court in *Griffin v. Illinois*, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956),

> "Both equal protection and due process emphasize the central aim of our entire judicial system – all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' "
>
> (351 U.S. at 17)

The Court further characterized this nation as

> "a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law."
>
> (351 U.S. at 19)

It has always been the aim of the equal protection guarantee, as expressed in numerous cases of the Supreme Court, to treat alike all persons similarly situated. The Court in *Royster Guano Co. v. Virginia*, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989 (1920), expressed this principle as follows:

> " . . . the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike."
>
> (253 U.S. at 412)

See, also, *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).

The treatment of Bruce Argo in the present case falls far short of these constitutional principles.

E. The Court Erred in Concluding That the Loss of an Article 20 Self-Defense Justification Was Less Than Devastating to the Defense.

In the Fifth Circuit ruling, the court erred in concluding that the trial court's failure to charge under La. R.S. 14:20 and its implementation of Louisiana's statutory self-defense scheme did not prejudice the defendant. We submit that nothing could be farther from the truth. Even the

state has not contested the fact that the court's denial of this defense effectively removed the heart of the defendant's case. One aspect of the court's ruling is to the effect that since "self-defense" was talked about anyway, there was little practical harm to the defendant by the court's ruling. On the contrary, the thrust of the defendant's case was to have been that as a matter of law, a defendant can claim self-defense under certain circumstances *when fired upon by a police officer.* It was defense counsel's intent to explore this key area with every single juror and to accept no juror who could not apply the law that even a police officer in the course of his duties under some circumstances can present such a threat to the defendant that he is justified in firing at that officer. This is clearly acceptable under Article 20.

Accordingly, with the interrogation of the first juror, defense counsel began questions directed at the fact that a police officer can be the focus of a self-defense case. In fact, defense counsel had a blowup of the accepted Article 20 self-defense instruction for showing to the jury during voir dire. Immediately, as counsel began to question jurors about their ability to apply this statute, the state objected to the applicability of a defense under Article 20 and to any reference during voir dire to this statute that would permit a police officer acting in the course of his duties to be the focal point of a justification of self-defense.

After this objection, the court recessed the proceedings, and this question was then argued at length by both sides. The court ultimately sustained the objection and denied the defense the right to question the jurors with respect to Article 20.

This ruling denied the defense the right to question all jurors regarding their understanding of a police officer's being the focus of a self-defense justification. It is true that self-defense was urged to an extent thereafter, but it was virtually meaningless without the opportunity to question every juror at length concerning the possibility of circumstances wherein the law would allow a shooting in self-defense in response to a law enforcement officer's firing shots in the line of duty. In fact, the prosecution informed the jurors that a policeman properly doing his job would *not* be a "forcible offender" under Article 19, a self-defense statute that obviously did not fit this situation.

The trial court totally emasculated this defense. The defense was denied the right to utilize Article 20. Any argument as to self-defense that remained amounted almost to mere verbiage since the jurors could not be questioned about the role of a policeman in a self-defense case. Thus, we submit that the court is greatly in error in suggesting that the loss of an Article 20 instruction was not highly significant to the defense of this case.

II.

THE COURT'S REFUSAL TO ALLOW THE JURY TO CONSIDER SELF-DEFENSE UNDER ARTICLE 20 UNLESS THE VICTIM HAS DIED VIOLATES DUE PROCESS.

When the district court ruled that Bruce Argo, charged with attempted first degree murder, was to be denied the justification of self-defense under Article 20 because his victim had not died, this eliminated self-defense as an issue in this criminal proceeding. (As we

have pointed out, an instruction under Article 19 was meaningless as it required a "forcible offender," which the police officer clearly was not.) It is undisputed that if the officer had died, Bruce would have been given the right to have self-defense under Article 20 considered by the jury. This is a denial of the basic fairness required by the Due Process Clause of the Fourteenth Amendment.

The notions of substantive due process are violated whenever the law under attack does not bear a real and substantial relationship to an appropriate governmental objective. *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934). The applicable standard is whether the law is reasonable in relation to the goal sought and whether it is in the interest of the community as a whole. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937). Surely it cannot seriously be said that this type of distinction promotes any governmental objective.

The trial court's application of this statute far exceeded the bounds of reasonableness and was both arbitrary and oppressive in terms of the Fourteenth Amendment's due process guarantee.

A. It Is A Violation Of Due Process For A Justification Of Self-Defense To Depend Upon Circumstances Occurring After The Time Of The Alleged Criminal Act.

The right to act in self-defense either exists or does not exist at the time of the charged event and cannot depend upon later occurrences. The present case runs counter to that principle and bases the right of self-

defense under Article 20 upon the later occurrence of whether the victim dies or not. This event might occur even days, weeks or years after the act for which the defendant is charged. As suggested previously, the victim could die after the trial even. We submit that it is a violation of due process to make a defense to a criminal act dependent upon events occurring after the act and over which the defendant has no control.

A defense is a justification for an act. All factors pertaining to that justification must exist at the time of the event. In theory a person must be able to analyze all factors and decide upon his course of action accordingly. If an accused has a right to act in self-defense, that right exists at the time he pulls the trigger. If he does not have a right to act in self-defense, this legal situation exists at the time he pulls the trigger as well.

Yet under the ruling of the trial court in this case, there might be no way of judging whether self-defense exists or not at the time the defendant fires the shot for which he is charged. He must wait and see if the victim dies or not. Under this holding, guilt or innocence might well be determined by an event occurring later, over which the defendant had no control whatsoever.

If we could freeze time at the moment that the shot was fired in this case, the alleged offense would have been completed. The elements of the offense would allegedly be present at that time. It is illogical to say then that we don't yet know whether there is a defense of self-defense or not at that same time. We submit that it violates a defendant's right to due process to peg his right of self-defense on the uncertainty of such a future

event. Under the Due Process Clause, the defendant has a constitutional right to know what is criminal and what is not criminal at the time that he acts.

This violates the fair warning requirement of the Due Process Clause. If a statute with criminal sanctions is indefinite or vague, the crippling constitutional defect is that it does not give individuals adequate notice of the conduct prohibited by law. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). All persons "are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939). A statute is void if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617, 98 L.Ed. 989, 74 S.Ct. 808 (1954). See, also, *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926); *Cline v. Frank Dairy Co.*, 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146 (1927). Fundamental fairness requires that a person cannot be sent to jail for a crime he could not with reasonable certainty know he was committing. *Scull v. Virginia*, 359 U.S. 344, 79 S.Ct. 838, 3 L.Ed.2d 865 (1959).

Thus, the requirement that crimes be defined with appropriate definiteness is now held to be an essential element of due process of law. A statute, as written or interpreted, that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute is a violation of due process. In *Watkins v. United States*, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957), the Court stated that:

> " . . . the courts must accord to the defendants every right which is guaranteed to defendants in all other criminal cases. Among these is the right to have available, through a sufficiently precise statute, information revealing the standard of criminality *before the commission of the alleged offense.*"
>
> (354 U.S. at 208) (Emphasis added)

Watkins and the other due process cases of this nature emphasize that a defendant must be able to know *before he acts* precisely what acts carry criminal consequences.

The substantive crime and any defense that might apply must be viewed as a unit proscribing exactly what conduct is prohibited and what is justified. The justification statute, therefore, must describe the defense with sufficient clarity that ordinary men of reasonable intelligence are capable of discerning its meaning and conforming their conduct thereto. If a statute is applied in such a way that a defendant does not know – and cannot know – whether his action is legally justifiable or not at the time he commits the act, this statute, either as written or as applied, violates due process.

A defendant simply is entitled to know before he acts whether his act is criminal or not. Where, as in this case, the law leaves to an uncertain event, occurring after the defendant's act, whether a defense applies, it is impossible for this individual to be aware in advance of the criminality or not of his act - and the absence of the required fair warning violates due process.

This is further complicated by all types of ancillary questions noted previously. A rule such as the one applied by the trial court is fraught with an unimaginable

number of unwieldy complications. And these complications need not exist. The problems arise solely from the fact that the court has applied a distinction that is not only arbitrary and serves no purpose but that also cannot be determined until after the fact. On neither ground can it be reconciled with due process.

B. The Trial Court Relieved The State Of One Of The Elements Of Proof In Violation Of The Due Process Clause.

Under Louisiana law, the state has the burden of disproving self-defense once it is raised. *State v. Green*, 483 So.2d 957 (La. 1986); *State v. Savoy*, 418 So.2d 547 (La. 1982). Like all other elements of the crime, this proof must be made beyond a reasonable doubt. *State v. Collins*, 306 So.2d 662 (La. 1975); *State v. Patterson*, 295 So.2d 792 (La. 1974).

> "The defendant who raises the issue of self-defense does not assume any burden of proof whatsoever . . . "
>
> (*State v. Savoy*, supra, at 550)

In denying Bruce Argo the justification of self-defense in the present case, the court relieved the state of one of its elements of proof. If the defendant had been on trial for first degree murder, the state would have been required to disprove self-defense beyond a reasonable doubt. It would have had to show that the defendant did not reasonably believe either that he was in imminent danger or that the killing was necessary. Yet when Bruce Argo went to trial on a lesser grade of that same offense,

attempted first degree murder, the court relieved the state of the burden of proving this element.

This due process objection is based upon the relationship between an attempt and the substantive offense. There is a direct relationship between the two. La. R.S. 14:27 provides:

> "C. An attempt is a separate but lesser grade of the intended crime; and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt."

An attempt, therefore, is not an isolated crime but is directly tied in with the intended offense. One must look to the first degree murder statute to determine the elements of this offense allegedly attempted by the accused. An attempt is simply an incomplete or uncompleted version of the substantive offense to which it attaches. Attempted first degree murder is in fact a lesser grade of the crime of first degree murder. The same defenses should apply to both. It is illogical to hold that one being tried for murder would have a defense that is not available to one charged merely with attempted murder.

If the state chooses to charge the defendant with attempted murder, it must be prepared to give him the benefit of the same defenses that apply to one charged with the completed crime of murder itself. Any other interpretation is both illogical and a denial of a valuable defense to the accused – in violation of due process. Bruce Argo was denied a defense which should have been afforded him at his trial – a defense that the state

should have been required to disprove. Thus, the state was relieved of proving one of the elements of the offense.

This is a violation of due process. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), holds that due process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), the Supreme Court struck down a state statute that imposed upon a defendant the burden of proving that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter, holding that due process requires the prosecution to prove the absence of such circumstances. See also, *Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (5th Cir. 1982), modified on rehearing, 697 F.2d 699 (5th Cir. 1983); and *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

Thus, due process is violated whenever the state's burden of proof is anything less than proof beyond a reasonable doubt and where any element of the state's proof is shifted to the defendant. The present ruling goes even beyond this in severity. Not only did the trial court relieve the state of proving the absence of the appropriate self-defense, but it went a step further and denied the defendant himself the right to prove it. The jury was not allowed to consider whether or not Bruce Argo reasonably believed that he was in imminent danger and that killing was necessary to save himself from that danger. We submit that this is a serious violation of Bruce Argo's due process rights.

C. Due Process Was Violated By The State Trial Court In Failing To Interpret This Criminal Statute Strictly In Favor of the Defendant.

Traditional principles of statutory interpretation require that criminal statutes be strictly interpreted in favor of the defendant. The basis for this rule is the right to fair warning required by the Due Process Clause of the Fourteenth Amendment. In this connection we refer the Court to those cases cited in the preceding section of this brief. Further, Llewellyn writes that the court must try to "make sense as a whole out of our law as a whole." (Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed," 3 *Van.L.Rev.* 395 [1950])

We submit that the state court's interpretation of this statute goes against the grain of proper statutory construction. It failed to interpret this statute so as to give the defendant the benefit of any doubt, choosing instead the interpretation most favorable to the prosecution. We suggest that this violates the principles of due process set forth in *United States v. Anzalone*, 766 F.2d 676 (lst Cir. 1985), and other cases cited therein (concerning the requirement of fair warning).

CONCLUSION

For the foregoing reasons, we submit that the state trial court seriously violated rights of Bruce Argo that are protected by the United States Constitution. We

respectfully request that this Honorable Court grant this petition for certiorari.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4121
USDC No. CV-86-1061

BRUCE E. ARGO,

Petitioner-Appellant,

versus

ROBERT H. BUTLER, SR., Warden,
Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

O R D E R:
Filed May 23, 1989

The application for a certificate of probable cause is DENIED. A certificate of probable cause should be granted only if the habeas corpus petitioner makes a substantial showing of the denial of a federal right. Rault v. Butler, 826 F.2d 299, 302 (5th Cir.), *cert. denied*, 108 S.Ct. 14 (1987). Argo makes no such showing.

Argo's first claim on appeal is that he was denied equal protection of the law and substantive due process by the trial court's implementation of Louisiana's statutory self-defense scheme which precluded him from raising the defense of self-defense under La.R.S. 14:20 because the victim of his attempted-murder did not die.

Argo's claim is that attempted-murder defendants are treated dissimilarly under La.R.S. 14:20 in that attempted murder-defendants whose victims die can assert self-defense under that statute while those whose victims live cannot.

At trial Argo requested a jury instruction on self-defense under La.R.S. 14:20 which reads in pertinent part:

> A homicide is justifiable:
>
> (1) When committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger[.]

The trial court denied this request because Argo's use of force did not result in a homicide. Instead, the jury was instructed under La.R.S. 14:19 which reads:

> The use of force or violence upon the person of another is justifiable, when committed for the purpose of preventing a forcible offense against the person or a forcible offense or trespass against property in a person's lawful possession; provided that the force or violence used must be reasonable and apparently necessary to prevent such offense, and that this article shall not apply where the force or violence results in a homicide.

"The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike; it does not require classes of people different in fact or opinion to be treated in law as though they were the same." Cunningham v. Beavers, 858 F.2d 269, 272 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 1343 (1989). *See* Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). Even more

fundamental than this, however, is the requirement that a litigant must demonstrate prejudice or injury as a result of a statute's operation or enforcement before he has standing to challenge the statute's constitutionality. *See* Howard Gault Co. v. Texas Rural Legal Aid, Inc., 848 F.2d 544, 557 (5th Cir. 1988); Canfield Aviation, Inc. v. National Transp. Safety Bd., 854 F.2d 745, 748 (5th Cir. 1988). Review of the entire record in this case against Argo's numerous claims of error leads to the conclusion that Argo was not prejudiced by the trial court's charge under La.R.S. 14:19 or its implementation of Louisiana's statutory self-defense scheme.

Four factors lead to this conclusion. First, Argo was not precluded from arguing to the jury that he acted in self-defense. The jury was specifically and repeatedly presented with a claim of self-defense in this case, and the court specifically instructed the jury concerning the defense of self-defense under La.R.S. 14:19. Argo claims that La.R.S. 14:19 did not apply to his case because it only justifies the use of force against a forcible offender and his victim, a police officer acting in the line of duty, was in no sense a forcible offender. Under La.R.S. 14:19, the defense of self-defense requires a dual inquiry: an objective inquiry into whether the force used was reasonable under the circumstances; and a subjective inquiry into whether the force was apparently necessary to prevent a forcible offense. State v. Freeman, 427 So.2d 1161, 1163 (La. 1983); State v. Agnelly, 515 So.2d 821, 823 (La. Ct. App. 1987). Under Louisiana law it appears that the use of force against a forcible offender falls within the subjective inquiry into whether the force was apparently necessary. Accordingly, the mere fact that the forcible offender

was a police officer acting in the line of duty would not, in and of itself, make La.R.S. 14:19 inapplicable because it is the subjective belief of the individual allegedly acting in self-defense which is controlling and not the offender's status. Based on the foregoing, the Louisiana statutory self-defense scheme did not impinge upon Argo's fundamental right to present a defense of self-defense.

Second, the trial court specifically instructed the jury that it was the state's burden to prove beyond a reasonable doubt that Argo did not act in self-defense. This is the burden of proof which is applicable to La.R.S. 14:20, State v. Brown, 414 So.2d 726, 728 (La. 1982); State v. Patterson, 295 So.2d 792, 794 (La. 1974), and was more favorable to Argo than the burden of proof generally held applicable to non-homicide cases under La.R.S. 14:19. In the non-homicide situation the burden of proof is on the defendant to prove by a preponderance of the evidence that he acted in self-defense. State v. Barnes, 491 So.2d 42, 47 (La. Ct. App. 1986); State v. Mason, 499 So.2d 551, 555 (La. Ct. App. 1986). *See also Freeman*, 427 So.2d at 1163; *Agnelly*, 515 So.2d at 823.

Third, "in the homicide situation pursuant to La.R.S. 14:20 the defense of self-defense requires only an objective inquiry as to whether the defendant 'reasonably believes that he is in imminent danger of losing his life . . . and that the killing is necessary. . . .'" *Freeman*, 427 So.2d at 1163 n.4. Requiring the state to prove beyond a reasonable doubt that Argo thought the force he used was not apparently necessary, the subjective prong under La.R.S. 14:19, was arguably more difficult than proving La.R.S. 14:20's objective prongs.

Finally, under the facts of this case the jury instruction under La.R.S. 14:19 was more favorable to Argo than an instruction under La.R.S. 14:20 would have been. One of the elements of a self-defense defense under La.R.S. 14:20 is that the individual reasonably believe that he is in imminent danger of losing his life or receiving great bodily harm. The state's witnesses testified to a gap between the time that the officer and Argo's companion exchanged gunfire and the time that Argo fired his shotgun blast into the officer's face. This fact would have undermined any claim that Argo reasonably believed that he was in imminent danger of losing this life when he fired the shot. The jury instruction under La.R.S. 14:19, which required a subjective showing that the force was apparently necessary, better accommodated the delay between the shots being fired in Argo's direction and Argo's return fire.

As Argo has failed to show any prejudice resulting from the trial court's charge under La.R.S. 14:19 rather than La.R.S. 14:20 or from the trial court's implementation of Louisiana's statutory self-defense scheme, he lacks standing to assert an equal protection or due process challenge. Argo's first claim of error is without merit.

Argo's final claim of error is that his fifth and fourth amendment rights were violated when the trial court refused to order recusal of the prosecutor for receiving information covered by a non-disclosure agreement.

Prior to trial and after Argo entered a plea of "not guilty by reason of insanity," Argo underwent a state psychiatric examination. The district attorney and Argo

agreed that the district attorney would receive no information concerning the facts of the case from the psychiatrist's report, but an assistant district attorney, unaware of the agreement, ordered a second evaluation and received back a factual account of the offense from the second psychiatrist. Argo moved to recuse the entire district attorney's office from the case for receiving the second report. Following and *in camera* inspection of the second report and of the record of Argo's preliminary examination, the trial court held that the facts described in the report had already been tendered in open court during the preliminary examination. Accordingly, it found recusal of the district attorney's office to be unnecessary. The trial court ordered, however, that the report be sealed and inadmissible at trial.

In the instant case, the trial court's finding that the second psychiatrist's report contained essentially the same information as was brought out in Argo's preliminary examination must be afforded the presumption of correctness pursuant to 28 U.S.C. § 2254(d). *See* Sumner v. Mata, 449 U.S. 539, 546-47, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981); Uresti v. Lynaugh, 821 F.2d 1099, 1101 (5th Cir. 1987). Accordingly, as the second report did not contain any information that the district attorney's office did not already have, Argo's rights were not violated when the district attorney's office was not recused, and Argo cannot show any prejudice resulting from the trial court's action. Argo's second claim of error is meritless.

Based on the foregoing, Argo has failed to make a substantial showing of the denial of a federal right.

/s/ Will Garwood
WILL GARWOOD
UNITED STATES CIRCUIT
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

BRUCE E. ARGO,
Petitioner,

Versus

FRANK BLACKBURN, WARDEN,
LOUISIANA STATE PENITENTIARY,
Respondent.

CIVIL ACTION NO.
86-1061
(Judge Stagg)

JUDGMENT
(Filed Feb. 8, 1988)

For the reasons stated in the Report and Recommendation of the Magistrate previously filed herein, and after an independent review of the record, including written objections filed by the petitioner, having determined that the Magistrate's findings are correct under the applicable law;

IT IS ORDERED that the application for writ of *habeas corpus* filed by petitioner Argo be DENIED.

THUS DONE AND SIGNED at Shreveport, Louisiana on this the 7th day of February, 1988.

/s/ Tom Stagg
TOM STAGG, CHIEF JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

BRUCE E. ARGO,
Petitioner,

Versus

FRANK BLACKBURN, WARDEN,
LOUISIANA STATE PENITENTIARY,
Respondent.

CIVIL ACTION NO. 86-1061
(Judge Stagg)

SUPPLEMENTAL REPORT AND RECOMMENDATION OF MAGISTRATE
(Filed Jan. 20, 1988)

In accordance with the standing order of Honorable Tom Stagg, Chief Judge, filed with the Clerk of this Court on March 11, 1981, this *habeas corpus* case was referred to the undersigned Magistrate for review, report and recommendation.

On May 16, 1986 petitioner Argo, *pro se*, submitted to the Clerk of this Court an application for a writ of *habeas corpus* under 28 U.S.C. § 2254, which was allowed to be filed *in forma pauperis*.

Petitioner Argo alleges that he is presently incarcerated in the Louisiana State Penitentiary after a plea of not guilty and not guilty by reason of insanity, jury trial, conviction and sentence to forty years imprisonment imposed on October 26, 1984 by the First Judicial District Court, Caddo Parish, Louisiana, for the crime of attempted first degree murder. State court remedies are

considered to be exhausted. See Order, Chief Judge Tom Stagg, September 30, 1987.

In his present writ application petitioner Argo asserted the following grounds for his alleged illegal incarceration:

1. It is a violation of the Equal Protection Clause of the Fourteenth Amendment to allow a justification of self-defense under Article 20 of the Louisiana Criminal Code to a defendant charged with attempted murder when his victim has died but to deny his defense to one charged with the same crime whose victim has lived.

2. The trial court's refusal to allow the jury to consider self-defense under Article 20 unless the victim has died violates the Due Process Clause.

3. It violates due process for a justification of self-defense to depend upon circumstances occurring after the time of the alleged criminal act.

4. In denying the defendant the requested self-defense charge, the trial court relieved the state of one of its elements of proof in violation of the Due Process Clause.

5. Due process was violated by the court's failure to interpret this criminal statute strictly in favor of the defendant.

6. The defendant's Fifth and Fourteenth Amendment rights were violated when the court refused to order recusal of a prosecutor who received privileged information given him in violation of a non-disclosure agreement.

The following is an excerpt of the facts of the case as summarized by the Second Circuit Court of Appeal. *State v. Argo*, 476 So.2d 409 (La. App. 2nd Cir. 1985), writ denied, 481 S.2d 1347 (La. 1986):

> Defendant and two friends, Durr and Edwards, went on a hunting trip in a stolen truck during the last days of October, 1983. During the evening of October 29, they returned to Shreveport and stole another pickup truck which was parked near Wallace Lake. According to testimony by Durr at trial, the three were chased in this truck by another car whose driver apparently recognized the truck as stolen. The three decided to leave the truck and steal yet another vehicle. They went to an apartment complex and attempted to "hotwire" a Mustang. The owner and her date suddenly appeared and as the three were leaving in the truck defendant pointed a shotgun at the date. The three proceeded to yet another apartment complex in search of a vehicle. They parked and Durr left the truck. He took a flashlight from the rear of the truck and approached a nearby car. Defendant was lying down in the back of the truck, perhaps asleep. At this time a police officer drove by the truck. He was aware of the earlier attempted theft and the assault. The officer ordered Durr to put his hands on the truck. The officer then noticed Edwards in the cab and ordered him to come out. As he was leaving the cab, Edwards shot twice at the officer. He returned fire, approximately five times; he never saw defendant in the back of the truck. The officer took cover and called for assistance. Just as he finished the call, he saw a flash of fire from the back of the truck and he was hit in the face by a shotgun blast from the defendant. Defendant, Durr and Edwards were all arrested

in a nearby area. The officer is legally blind as a result of the shooting.

In Grounds One, Two, Three, Four and Five, petitioner Argo attacks the constitutionality of La. R.S. 14:19-20, as applied by the trial court in this case, and asserts that the trial court erred when it refused to instruct the jury under La. R.S. 14:20 because the offense did not result in homicide. Instead the court instructed the jury under La. R.S. 14:19. Petitioner argues that the jury knew that La. R.S. 14:19 did not apply because a police officer is not a forcible offender and, thus, this instruction was the equivalent of no instruction at all.

Petitioner argues at great length that strict scrutiny should be made of the statute and that there is no compelling governmental interest in defining La. R.S. 14:20 to apply only to those crimes resulting in a homicide. Alternatively, petitioner argues that if the rational review standard applies, then the statute has no logical rationale for its classification. Petitioner also argues that it is a denial of due process for a justification of self-defense to depend upon circumstances occurring after the time of the alleged criminal act.

The state legislatures and not the courts are empowered to define criminal offenses and defenses thereto.

> " . . . [T]he discretion to define criminal offenses and prescribe punishment, resides wholly with the state legislatures. *Whalen v. United States*, 445 U.S. 684, 689, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715 (1980); *Rochin v. California*, 342 U.S. 165, 168, 72 S.Ct. 205, 207, 96 L.Ed.183 (1952). See also *Rummel v. Estelle*, 445 U.S. 263, 275 (100 S.Ct. 1133, 1139, 63 L.Ed.2d 382 (1980) . . .

Schall v. Martin, 467 U.S. 253, 268, 104 S.Ct. 2403, 2412, 81 L.Ed.2d 207 (1984). See also *Andrade v. McCotter*, 805 F.2d 1190 (5th Cir. 1986), affirmed, 807 F.2d 398 (5th Cir. 1986).

It is the court's function to determine if the classification created by the legislature has a rational basis and is not arbitrarily defined.

In its opinion affirming Argo's conviction, the Second Circuit Court of Appeal quoted the Louisiana Supreme Court regarding the self-defense statutes:

> It is clear that the statutes comtemplate two different standards for two different situations. In the instance where no homicide results, as is the case here, the use of force or violence in self-defense is justified when the *amount used is reasonable* and it is apparently necessary to use such force to protect oneself. [14:19] On the other hand, when a homicide results from the use of force or violence, it is justified as self-defense only if the person *reasonably believed he was in imminent danger of losing his life or receiving great bodily harm* and that deadly force was necessary to save his life. [14:20] (Emphasis added) *State v. Guinn*, 319 So.2d 407, 409 (La. 1975).

State v. Argo, 476 So.2d 409 (La. App. 2 Cir. 1985)

The legislature drafted 14:20 with a more stringent burden upon the defendant than in 14:19 to deter the use of deadly force except in the most necessary circumstances. There is clearly a rational basis for distinguishing those criminals whose offenses result in homicide and those criminals whose offenses do not result in homicide.

Under the defendant's reading of the statutes, the real classification made is between those defendants

repelling a *legal* attacker, such as a peace officer, and those defendants repelling an *illegal* attacker committing a forcible offense. There is, contends petitioner, no defense of self-defense against a peace officer, but there is such a defense against a forcible offender. There is an obviously legitimate legislative basis for such a distinction. The legislature could reasonably conclude that there should be no defense to violent resistance of the legitimate acts of peace officers and other non-offenders. Indeed, there is a compelling state interest in discouraging violent resistance to police officers acting within the scope of their duties.

The fact that the legislature may have made a different choice in establishing defenses to homicide charges – changing both the nature of the defense as well as those who can claim it – does not invalidate the legislative choice in the non-homicide situations governed by La. R.S. 14:19. Cases involving the death of the victim present a whole host of legitimate considerations not present when the victim is not killed. Even if petitioner were to argue that the legislature should have deprived the defense of self-defense to those who kill peace officers (covered by La. R.S. 14:20) as well as those who attempt to kill them and fail (covered by La. R.S. 14:19), the U.S. Supreme Court has held that "The Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 486 (1970). The fact that the legislature may have been "underinclusive" in restricting the availability of the defense of self-defense in attacks on peace officers does not render the partial solution invalid. As Justice Oliver

Wendell Holmes observed "We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931). See generally Tribe, American Constitutional Law at 997-997 (1978).

Furthermore, petitioner's argument that the self-defense instruction given under La. R.S. 14:19 did not allow the jury to consider self-defense is not supported by the record. The bulk of the closing argument by petitioner's counsel was devoted to the argument of self-defense. Likewise, the district attorneys devoted substantial time to the issue of self-defense. The State's arguments against self-defense were based primarily upon the facts and not upon a legal argument that the defense was unavailable to petitioner because a peace officer was involved. Finally, the jury instructions given by the trial court refer to that defense as follows:

> I further charge you that the burden is not upon the accused to prove that he acted in self-defense. It is upon the State to prove beyond a reasonable doubt that the act or acts were not committed in self-defense. The law of Louisiana provides that a person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict.
>
> The use of force or violence upon the person of another is justifiable when committed for the purpose of preventing a forcible offense against a person or a forcible offense or trespass against

> property in a person's lawful possession provided that the force or violence must be reasonable and apparently necessary to prevent such offense and that this article should not apply where the force or violence results in homicide.
>
> (Vol. 2, page 433)

No one instructed the jury or even argued to the jury that a police officer could not be a forcible offender as a matter of law. Furthermore, the statute and the jury insruction both leave open the argument that the defense is available under the statute if the defendant reasonably believes his actions are necessary to prevent a forcible offense. Thus, a fair reading of the record as a whole, including the jury instructions and arguments of counsel, indicate that the jury was presented with the question of whether petitioner was acting in self-defense and that the jury concluded he was not. This conclusion is certainly supported by overwhelming evidence that petitioner knew he was engaging in illegal activity at the time, that he was being pursued by the victims of that activity as well as the authorities, and that he probably even knew that it was a police officer with whom he and his friends were exchanging gunfire. The only basis for the claim of self-defense appears to be the speculation by one witness that the petitioner may have been sleeping before the gunfire broke out.

As the trial court gave the self-defense instruction under 14:19 *which was applicable to the facts of the case,* the court did not relieve the state of one of its elements of proof, nor did it violate due process by failing to interpret 14:20 strictly in favor of the defendant.

Finally, the defendant argues that his Fifth and Fourteenth Amendment rights were violated when the court refused to order recusal of a prosecutor who received privileged information given him in violation of a non-disclosure agreement. Argo made a plea of "not guilty and not guilty by reason of insanity". Argo underwent a state requested psychiatric examination. An agreement had been entered into stipulating that the district attorney would receive no knowledge of the facts of the crime related by Argo to the psychiatrist. By error, an assistant district attorney not aware of that agreement later requested a second psychiatric examination and received a factual account from the second psychiatrist.

Subsequently, Argo moved to recuse the Caddo Parish District Attorney's Office or, alternatively, the assistant district attorney receiving the report. A hearing was held on the motion. (Vol. 1, p. 63) The court denied the motion finding that "The fact structure as tendered by the defendant to the medical member is not so extenuating outside the facts that have been tendered in open court in the preliminary examination as to render the necessity to recuse the State's representatives in this matter." (Vol. 1, p. 67). The court ordered that the report be sealed and that the information be non-admissible.

A review of the line of cases involving court-ordered psychiatric testimony shows that the accepted remedy for factual statements made by the defendant about the offense is that the statements not be admissible. See *State v. Jones*, 359 So.2d 95 (La. 1978) cert. denied, 439 U.S. 1049, 99 S.Ct. 727 (1978), *United States v. Cohen*, 530 F.2d 43 (5th Cir. 1976) cert. denied, 429 U.S. 855, 97 S.Ct. 149 (1976). The court in this case required the statement's

suppression. The petitioner argues generally that the district attorney would have been able to use the factual report to aid its case. However, Argo makes no specific objection where the prosecutor used the information at trial. The trial court made the finding that the report did not contain any information that was not already generally known from the preliminary examination. This factual finding is entitled to a presumption of correctness under 28 U.S.C. § 2254.

As Argo makes no showing that these factual statements were used to incriminate him, this argument lacks merit.

Accordingly;

IT IS RECOMMENDED that the application for the writ of *habeas corpus* filed by petitioner Argo be DENIED.

Under the provisions of 28 U.S.C. § 636(b)(1)(C), failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

THUS DONE AND SIGNED at Shreveport, Louisiana, on this the 19th day of January, 1988.

/s/ Roy S. Payne
ROY S. PAYNE
UNITED STATES MAGISTRATE